Supreme Court, U. S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLER

80-369

No. _____

UNITED STATES SUPREME COURT

October Term, 1980

ALFRED AVINS, Petitioner,

v.

JAMES P. WHITE, Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION

ALFRED AVINS
Petitioner Pro Se
P.O. Box 2532
Washington, D.C. 20013
638-6393

QUESTIONS PRESENTED

1. Whether the First Amendment and the rule of New York Times v. Sullivan protects a person in divulging confidential information to one he knows is not entitled to receive it.

2. Whether the head of an academic institution which applies for accreditation or other licensing thereby becomes a "public figure" as to matters connected with its licensing.

3. Whether an application for accreditation or other licensing of a school is a "public controversy."

4. Whether private comment not intended for public discussion is covered by the rule of New York Times v. Sullivan.

5. Whether an expression of an intangible evaluation in an accreditation or licensing report constitutes an "opinion" or "idea" which is constitu-

tionally immune from liability under Gertz v. Robert Welch.

6. Whether an expression of intangible evaluation in an accreditation or licensing report precludes the existence of undisclosed factual observations so as to be immune under the rule of Gertz v. Robert Welch.

7. Whether the Court of Appeals invaded the province of the jury in determining that the first and third inspection reports were non-defamatory.

8. Whether the failure of defendant to make timely objection at the conference called by the trial judge to consider the proposed charge to the jury constitutes a waiver of any error in submitting defamation claims arising out of the inspection reports to the jury under Rule 51 of the Federal Rules of Civil Procedure.

9. When a plaintiff obtains a

general verdict on two or more defamation claims, one of which was properly submitted to the jury and one of which was not, and defendant has made no request for a special verdict or interrogatories, may the court, either on its own motion or that of plaintiff, reduce the damages rather than ordering a new trial?

10. Whether quasi-negligence concepts of proximate cause apply to a claim that, in violation of due process and because of political hostility, a quasi-government licensing inspector manipulated the licensing process so as to remove the founder of a school from connection therewith.

TABLE OF CONTENTS AND AUTHORITIES

REPORTS DELIVERED BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 20

CONCLUSION 39

APPENDIX 40

CASES

Arctic Co. Ltd. v. Loudoun Times-Mirror, U.S. Ct. of Appeals, 4th Cir., No. 79-1121, July 3, 1980 ..... 29, 30

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Inc., 369 U.S. 355 ..... 32, 33

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) 36

Carlson v. Green, 64 L.Ed. 15 (1980) 38

Dennis v. Denver & R.G.W.R. Co., 375 U.S. 208 (1963) 33

Dixson v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977) 25

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 28, 29, 30

Grove v. Dun & Bradstreet, 428 F.2d 433 (3rd Cir.), cert. denied, 404 U.S. 898 (1971) 27

Harley-Davidson Motorsports v. Markley, 279 Ore. 361, 568 P.2d 1359 (1977) 27

Hood v. Dun & Bradstreet, 486 F.2d 25 (5th Cir. 1973) 27

Hutchinson v. Proxmire, 99 S.Ct. 2675 (1979) 23, 25

Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647 (10th Cir. 1971) 27

Mid-America Food Service v. ARA Services, Inc., 578 F.2d 691 (8th Cir. 1978) 27, 35

Miller v. New York Cent. R.R., 239 F.2d 10 (7th Cir. 1956) 35

New York Times v. Sullivan, 376 U.S. 254 (1964) 21, 22, 26, 27, 28

Plechner v. Widener College, 569 F.2d 1250 (3rd Cir. 1977) 18, 19, 24

Rogers v. Baltimore O. R.R. Co., 325 F.2d 134 (6th Cir. 1963) 34

Snepp v. United States, 62 L.Ed. 704 (1980) 22

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 25

CONSTITUTION

U.S. CONST. amend I 1, 20, 21, 22
U.S. CONST. amend V 1
U.S. CONST. amend XIV 1, 2

STATUTES

28 U.S.C. § 1254 (1954) 1

FED. R. CIVIL P. 51 ..... 34, 35

MISCELLANEOUS

5A MOORE'S FEDERAL PRACTICE ¶ 51.04 34

REPORTS DELIVERED BELOW

The opinions delivered below by the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit are annexed hereto in the appendix.

JURISDICTION

The judgment of the Court of Appeals was made on June 30, 1980, and the mandate issued on July 22, 1980. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. sec. 1254.

CONSTITUTIONAL PROVISIONS

Amendment 1: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Amendment 5: "No person shall be . . . deprived of . . . property without due process of law . . . ."

Amendment 14: "No State shall . . . deprive any person of . . . liberty or property without due process of law, nor deny to any person within

its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Plaintiff, a sometimes law professor and dean, is, according to the Association of American Law Schools, "a unique figure in American legal education." (Brief in Ct. of Appeals, p. 5) He is one of the most conservative legal educators, politically. Prior to 1971, he "possessed an impressive academic background with numerous advanced degrees and many legal publications to his credit." (Slip op., p. 3) He is the only professional legal educator in recent history to start his own law school. In 1971, he founded Delaware Law School, the only law school in that state, and became its first dean. In 1974, when the school first applied for American Bar Association accreditation, plaintiff was Dean,

Trustee, professor, and a guiding influence in the school. By 1978, when the school became fully accredited, the plaintiff had involuntarily lost all connections or positions with Delaware Law School.

Defendant is a politically liberal legal academic. He is an employee of the American Bar Association with the title of Consultant on Legal Education. He has never founded his own law school, been a law school dean, earned a research doctorate in law, or written a legal text. Defendant is in charge of the administration of the accreditation process.

All but a handful of state supreme courts, and the federal courts as well, have delegated to the American Bar Association their governmental power of licensing law schools, so without accreditation or approval of A.B.A., graduates of

a law school cannot take the bar examination and become lawyers. Thus A.B.A. accreditation is a governmental-delegated license essential to the survival of a law school.

Plaintiff sued defendant for fraudulently manipulating the accreditation process of Delaware Law School with the intent of obtaining plaintiff's involuntary separation from D.L.S. in all of his manifold capacities. Plaintiff's theory was that defendant, and certain of his allies in the process, had deliberately delayed accreditation of the law school by false reports, and obstructions to plaintiff's presentation of the facts regarding the school, while at the same time campaigning among panicky parents and students frantic that the latter would graduate from an unaccredited law school and be unable to become lawyers, by leak-

ing confidential information and misinformation, derogatory to plaintiff, all conveying the message that the influence of plaintiff and his friends must be eliminated if the school were to be accredited in time for its first graduation. The defamation counts were based on some of the instances of false reporting and leakage of false information about confidential matters to parents and students. A further count, not appealed, was based on infliction of mental distress, resulting from the vandalism and threats of physical violence by hysterical students against plaintiff, a by-product of defendant's campaign.

The first inspection of D.L.S. occurred in January 1974. Defendant appointed himself as co-inspector. Violent quarrels erupted between defendant and his co-inspector on one side, and plaintiff and

the assistant dean on the other, about the inspection team's injection of their political preferences before a student audience, the team's attempt to force the expulsion from the law school of a student school newspaper editor for questioning A.B.A. accreditation procedures, and a team member's personal conduct towards female law students. In reprisal, the team's report about D.L.S. constituted an unremitting attack on all aspects of the school and plaintiff in particular. The report dragged in unrelated prior litigation brought by plaintiff and asserted that plaintiff started D.L.S. ecause he could not obtain another law teaching job. The report strongly suggested that plaintiff was an inferior law teacher. In its summary, the report asserted that plaintiff was only interested in minimum requirements and not

excellence. It stated that the most important deficiency was an academic ennui, or lack of intellectual spark prevading the faculty and students. The law school was denied accreditation because of the first report, and various readers thought the less of plaintiff because of it.

A second inspection occurred in May, 1974. Defendant appointed the inspection team but was not on it. The second report was much more favorable, although some deficiencies were still noted. Plaintiff was singled out for praise. Because plaintiff had been discredited before the Accreditation Committee and Council of the Section of Legal Education by the first report, he asked a nationally respected law professor, Victor Rosenblum, to appear before these bodies to testify about progress at D.L.S. that the latter

had seen on a visit. Defendant used his position to bar Rosenblum's appearance. The Accreditation Committee and Council not only turned D.L.S. down for accreditation a second time, but the latter also passed a resolution that D.L.S. was not making satisfactory progress under plaintiff's administration.

After the second refusal of accreditation, plaintiff frankly told a committee of Philadelphia judges and lawyers, whose children attended D.L.S., that political and personal considerations were motivating defendant and certain Council members in delaying accreditation. Plaintiff suggested that parents protest this to members of the House of Delegates whom they knew. A parent, Philadelphia Common Pleas Judge G. Fred DiBona, volunteered at his own expense to go to the A.B.A. Convention in Hawaii in August 1974 to

do this. While there, defendant leaked a great deal of confidential information and misinformation derogatory to plaintiff to DiBona, although A.B.A. policy prohibits divulgence of confidential information about a law school to students or parents. DiBona reported to the student body upon his return that because of political and personal hostility D.L.S. would never be accredited as long as plaintiff remained dean.

The second Council resolution had directed defendant to meet with the D.L.S. Board of Trustees to convey its views. On August 23, 1974, defendant arrived for the meeting. DiBona came to pick him up and went to lunch with defendant. Plaintiff and Assistant Dean Tovey accompanied them. Defendant discussed a variety of matters regarding D.L.S. there, including defendant's endorsement of DiBona as a

trustee. Defendant also repeated an accusation previously made to DiBona in Hawaii that plaintiff had been guilty of lying to the second inspection team about the existence of the U.S. Code Service in the library. During the first day of the second inspection, when the team librarian criticized plaintiff for not having these books in the library, plaintiff purchased them overnight and cured this asserted deficiency. Defendant falsely accused plaintiff of concealing the overnight purchase from the team to DiBona. The latter in turn told other parents and students. The subject of defendant's false accusation was confidential under A.B.A. policies. The book fraud accusation is the basis for the slander count.

Judge DiBona's constant reiteration of defendant's information that D.L.S. would not be accredited as long as plain-

tiff remained Dean created a deep impression on the panicky students. Plaintiff sought to refute this and stabilize the D.L.S. situation by getting A.B.A. Council or Accreditation Committee members to deny this. Defendant used his position to thwart plaintiff's efforts by sending the D.L.S. Trustees a fraudulent letter falsely accusing D.L.S. and plaintiff of violating Standards which were not violated, falsely accusing plaintiff of deliberately aborting the August 23rd Trustees' meeting and falsely accusing plaintiff of giving misinformation to local newspapers about him. Copies of these letters were sent to Council members, blackening plaintiff and destroying plaintiff's ability to obtain denials of Council members that plaintiff must resign. The student body became so unmanageable that on September 8, 1974, plaintiff was

forced to resign as Dean.

When the new Dean, Arthur Weeks, took over, plaintiff remained as a professor and Trustee. Defendant continued his campaign against plaintiff. On December 18, 1974, he wrote to Council officials suggesting without basis that plaintiff was threatening a lawsuit against them. A Council member, as a result, denounced plaintiff to the new Dean. Defendant expressed opposition to plaintiff's continued influence in the school as a Trustee to an inspector appointed by the Delaware authorities to determine whether it should receive degree-granting authority, and to a former A.B.A. president. Nevertheless, a majority of Trustees remained friends of plaintiff, to defendant's knowledge.

Defendant appointed himself as chairman of the third inspection team, which

came in January, 1975, and appointed as co-inspectors team members who had no prior experience at independent law schools dealing with boards of trustees. During the inspection, defendant continued to display strong aversion towards plaintiff. He suggested to Professor Feinberg that the faculty recruited by plaintiff was "stifling" because of its conservative political orientation and consequent lack of "intellectual ferment." Defendant inquired about faculty political views.

Each of the three team members wrote a different part of the report. A dean wrote the part lauding plaintiff as a teacher. Defendant wrote the part criticizing the Board of Trustees, and the summary. The summary recommended "appointment of an experienced, recognized and respected legal educator." This reiterated

views defendant had previously expressed to the Council and the Trustees themselves. Plaintiff was a board member, and in the context of the situation and the report it suggested that plaintiff did not fall into this category. The Council resolution specifically criticized the Board of Trustees. This backhanded criticism of plaintiff served as the basis for the third defamation count sent to the jury by the trial judge.

Many of defendant's cr iticisms of D.L.S. in the summary were fraudulent, misleading, and impossible of correction within a reasonable time. They criticized D.L.S. for practices permitted at other accredited law schools. They were designed to delay accreditation once again, and the A.B.A. again turned down D.L.S. in February 1975, at its midyear meeting in Chicago.

Nine students and two parents, DiBona and Mitchell Miller, accompanied Dean Weeks to the A.B.A. midyear meeting in Chicago. The students and parents were panicky. In violation of A.B.A. confidentiality rules, defendant had breakfast with Student Bar Association President Frederick Kessler, where he criticized plaintiff and other members of the Board of Trustees and leaked derogatory information, some of it false, about plaintiff to Kessler. Kessler in turn relayed this conversation to other students. Defendant also told the parents and students in a hallway gathering that the Board of Trustees had to be revamped, enlarged and broadened for accreditation. Upon their return, DiBona and Miller circulated a memorandum demanding, inter alia, plaintiff's removal from the Board of Trustees and its enlargement and restructuring.

Kessler and the Student Bar Association made the same demand. When plaintiff refused to resign as a Trustee, students slashed the tires of his car and invaded his classroom, threatening that they would inflict bodily harm on him.

On March 12, 1975 defendant spoke by telephone with President Clarence Moll of Widener College, then interested in acquiring the Delaware Law School. Defendant told Moll that to become accredited, D.L.S. would have to get rid of its existing Trustees and 3/4ths of the faculty. This could be done by a corporate takeover ("affiliation"). On March 19, 1975, defendant wrote a highly misleading official letter to the Chairman and Dean of D.L.S., wherein he asserted that D.L.S. was violating various Standards for Approval which were, in fact, inapplicable. This fraudulent letter dis-

couraged the Trustees from trying to correct any remaining deficiencies in time for the May inspection. A few days later, defendant again breached A.B.A. confidences by telling parent Miller over the telephone that D.L.S. had a 95% chance of accreditation if affiliated and less than 50% if it remained independent. This created a firestorm of student demands for affiliation to obtain accreditation in time for the first graduating class.

When Charles Maddock, D.L.S Trustee in charge of the accreditation drive, tried to get reliable information from defendant as to what he should do to get D.L.S. accredited, he got nothing. Maddock also made a last-ditch effort to save the independence of D.L.S. by asking defendant to appoint the dean of an independent law school as an inspector.

Defendant refused to do this and gave a palpably false reason. In fact, the chairman of the fourth inspection team told Maddock that he would be guided by defendant's views in deciding whether to recommend affiliation. Finally, the D.L.S. Board of Trustees voted to affiliate the school to gain accreditation. However, the affiliation had not been consummated by the time of the July 1975 meeting of Accreditation Committee, and defendant pressed the D.L.S. Trustee there to complete it before the A.B.A. met in August 1975. Thus, on August 8, 1975, Widener College obtained control of the D.L.S. Board of Trustees, electing a majority thereof.

From the outset, Widener officials did not want plaintiff at D.L.S., either as a Trustee or as a professor. Plaintiff was unsuccessful in voiding the affiliation in court. Plechner v. Widener

College, 569 F.2d 1250 (3rd Cir. 1977). A few months later, President Moll of Widener fired him as a professor, and the Widener College Board of Trustees removed him as a Trustee, thus ending plaintiff's connection with the school which he had founded.

Plaintiff sued defendant in Superior Court of the State of Delaware, and defendant removed the action on the grounds of diversity of citizenship to U.S. District Court for Delaware. After amendment, plaintiff's suit was based on a federal cause of action for manipulating the accreditation process in violation of plaintiff's due process and equal protection rights and a related state cause of action for unlawfully interfering with plaintiff's advantageous relations with D.L.S., both arising out of the same factual matrix, defamation, and

infliction of mental distress. As a single count the jury found for defendant on the interference and manipulation claim. It also found for defendant on the mental distress claim. But it found for plaintiff on the defamation claim, awarding him $50,000 in damages.

The Third Circuit affirmed the interference and manipulation claim verdict against a contention that the jury was misinstructed on causation. It reversed the defamation verdict and ordered a new trial.

REASONS FOR GRANTING THE WRIT

Petitioner agrees with the Court of Appeals that the questionspresented are "important questions of defamation law" (slip op., p. 2) but submits that they were incorrectly decided from a First Amendment point of view.

Turning to the slander action for accusing plaintiff of book fraud before Judge DiBona, the Court of Appeals correctly held that the jury could properly have found that defendant was not authorized by the A.B.A. to divulge this confidential information to Judge DiBona, especially since defendant stated this in his own deposition. (Ct. of Appeals slip op., p. 15, Dist. Ct. op., pp. 7-8) Nevertheless, the Court of Appeals held that plaintiff must, on a retrial, prove that this leakage of confidential information was false under the standards of New York Times v. Sullivan, 376 U.S. 254 (1964). (Slip op., p. 16, 23) Times conferred extraordinary First Amendment protection on limited classes of defamation. The holding that leakage of confidential information not only enjoys First Amendment protection, but enjoys the extra-

ordinary protection of the Times rule, has far-reaching implications. It means that states cannot compensate persons injured by divulgence of confidential information if the information is true at all, since the First Amendment protects the right to speak the truth, and can compensate them for false and defamatory breaches of confidence, if public figures, only if they surmount the high Times barrier. This rule withdraws legal protection from confidential information of all sorts. Confidences are essential in many areas of business and private life. This Court has held that the First Amendment does not protect the right even to speak about governmental policies in breach of an agreement to keep information confidential. Snepp v. United States, 62 L.Ed. 704, 708 n.3 (1980). It should review this holding that a breach of

private confidences enjoys First Amendment protection.

The Court of Appeals holding that an application for accreditation of a school is a "public controversy" and that the executive of the school who makes the application injects himself into the controversy and thereby becomes a "public figure" for all matters relating to its accreditation also has broad implications. First, the actual controversy came about because defendant recommended against accreditation. A defendant cannot create the controversy which gives him protection. Hutchinson v. Proxmire, 99 S.Ct. 2675 (1979). Hence, the Court of Appeals held that the application for accreditation was itself the "public controversy." However, schools, colleges, and universities must not only receive, but also retain accreditation. An appli-

cation to continue accreditation would equally be a "public controversy." Thus, under this holding, all executives of schools, colleges, and universities throughout the country who seek to obtain or retain accreditation (and all do) are public figures in respect to all matters relevant to accreditation (which includes all matters relating to their jobs).

Moreover, accreditation is merely a form of government licensing, for without it graduates of the law schools cannot take the state bar examinations. Plechner v. Widener College, 569 F.2d 1250 (3rd Cir. 1977). Thus, the Court of Appeals reasoning applies with equal force to every application for a license or permit made to government for any business or occupation. While the accreditation of a law school affects its students, the licensing of an airline affects its

customers, the licensing of a lawyer or physician affects his clients or patients, the granting of a building permit or zoning permit affects tenants of the building, and any other government license affects those who deal with the licensee. The Court of Appeals' opinion has thus created a new class of public figures of indefinite extension and variation. The decided cases have not heretofore extended the concept of "public figures" so far. See, e.g., Dixson v. Newsweek, Inc., 562 F.2d 626, 628 (10th Cir. 1977). An application to government has not heretofore been thought to automatically confer "public figure" status. See Time, Inc. v. Firestone, 424 U.S. 448 (1976); Hutchinson v. Proxmire, 99 S.Ct. 2675 (1979). This extension warrants review here.

The holding of the Court of Appeals

that the Times rule governs private comment not intended for public discussion likewise warrants review. It stated that it was of public importance that discussion of accreditation matters be frank and full. (Slip op., pp. 21-23) It said that recipients of credit reports have less of an interest in them. However, a recipient of a credit report who proposes to lend money to the corporation which is the subject of the report has just as much interest in candidly knowing the financial status of the borrower as a parent of a student has in knowing the accreditation status of the law school where his son attends. The public importance of the free flow of financial information is illustrated by the many laws and regulations governing the raising of capital. Nevertheless, the Times rule has not heretofore been applied thereto.

There is a conflict among the Circuits regarding whether the Times rule applies to private defamation not intended for public discussion. The majority rule holds that it does not apply. For example, Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647, 649 (10th Cir. 1971) held:

> "a publication . . . which provides specialized information to a selective, finite audience is not a medium entitled to the extended constitutional protection provided by New York Times and its successor cases."

To the same effect, see: Hood v. Dun & Bradstreet, 486 F.2d 25, 29 (5th Cir. 1973); Grove v. Dun & Bradstreet, 438 F.2d 433 (3rd Cir. 1971), cert. denied, 404 U.S. 898 (1971); Mid-America Food Service v. ARA Services, Inc., 578 F.2d 691, 697 n.5 (8th Cir. 1978); Harley-Davidson Motorsports v. Markley, 279 Ore. 361, 568 P.2d 1359, 1364 (1977). The Times rule was created to protect robust public debate, not robust

luncheon table arguments, which are of lesser public importance.

Moreover, extension of the Times rule to slander actions based on private arguments in the presence of the person defamed creates special problems. There may be countervailing state policies against debate which is too unrestrained, i.e., to prevent breaches of the peace. The conflict with other Court of Appeals and state decisions, and the public importance of the extension of the Times rule, warrants review here.

Turning to the libel claims submitted to the jury, the Court of Appeals held that the first report was an "opinion" and hence immune from liability. While ostensibly based on Delaware law, in fact the Court of Appeals relied on the Restatement of Torts 2d which in turn is but a codification of Gertz v. Robert Welch, Inc., 418

U.S. 323, 339-40 (1974). Hence, the true basis for the decision was an interpretation of federal constitutional law. The Court of Appeals reasoned that an "intangible criterion" was an opinion constitutionally immune from liability, although the testimony in the record of witness John O'Brien and others revealed that the statement did lower plaintiff in the estimation of O'Brien and others. (Slip op., pp. 7-9)

The question of whether an expression of intangible evaluation in an accreditation or licensing report constitutes an "opinion" or "idea" which is constitutionally immune from liability under Gertz is an important one not heretofore decided by this Court. Other courts have routinely held expressions of intangible evaluations generally to be actionable. See, e.g., Arctic Co. Ltd. v. Loudoun Times-Mirror, U.S. Ct. of Appeals, 4th Cir., No. 79-1121,

July 3, 1980. ("They don't have a good reputation in archaeological circles.") If anything, an expression of an intangible in a licensing report should not be classified as a Gertz-type "opinion" even when a similar statement would enjoy that status in a newspaper. An applicant for a government or quasi-government license is entitled to due process and equal protection, which would be violated if the license were denied based, not on facts, but on subjective ideas of the licensing agency. Moreover, a false evaluation in a licensing report results in immediate harm to the applicant, viz., denial of the license, and is not subject to the "correction . . . of other ideas" as public debate generally. Because of the wholesale immunization of reports which the Court of Appeals produced, the issue is important enough for this Court to review.

Also regarding the libel counts, there was direct evidence from witness O'Brien, and deposition evidence, that after reading the last paragraph of the summary of the first report, these witnesses did think the less of plaintiff. Likewise, while the Court of Appeals' construction of the summary of the third inspection report, that only an additional respected legal academic was needed on the Board of Trustees, is possible viewing the report in a vacuum, it was not the view adopted by the participants at the time and place. There is documentary evidence that shortly after receiving this report the new Dean, Weeks, demanded plaintiff's resignation or removal from the Board of Trustees as being necessary for accreditation in a memorandum to the Board itself of February 26, 1975. There is also evidence that right after defendant leaked portions

of the report about the Trustees in general and plaintiff in particular to Student Bar Association President Frederick Kessler in Chicago, and underscored this with his derogatory information and misinformation about plaintiff, the latter led the S.B.A. in demanding plaintiff's resignation or removal from the Board, and that students become so insistent when plaintiff did not resign that they slashed the tires of his car and invaded his classroom, making threats of bodily harm against him. Since the affected participants felt that plaintiff was not the kind of "experienced, recognized, and respected legal educator" who would strengthen the Board, the jury had ample evidence to find that the sentence was a backhanded slap at plaintiff. Thus, there was sufficient invasion of the jury's province by the Court of Appeals to warrant correction here. See Atlantic & Gulf Stevedores, Inc.

v. Ellerman Lines, Inc., 369 U.S. 355, 358-59 (1962); Dennis v. Denver & R.G.W.R. Co., 375 U.S. 208, 210 (1963).

Even assuming that the Court of Appeals was correct in overturning the libel causes of action, its disposition of the case presents important questions under the Federal Rules of Civil Procedure warranting further review. One of the grounds upon which the trial judge had declined to order a new trial was that at a conference on his proposed charges, he instructed counsel to make objections in order to preserve their rights, and defendant's counsel did not object to submission of the libel claims to the jury or the instructions therein. (District Judge's opinion, pp. 15-17) Notwithstanding this failure to make timely objection, the Court of Appeals overturned the verdict because it might have been based on a libel claim, the submission to

the jury of which was not objected to. Had objection been made at the conference, plaintiff could have asked for interrogatories or a special verdict to protect his position.

The Court of Appeals' action seriously undercuts the ability of a trial judge to channel the flow of objections to a conference on instructions ("prayer conference") where the judge and the opposing party may protect against improvident instructions or submission of issues to the jury. The action in this case by the Court of Appeals violates Rule 51 of the Federal Rules of Civil Procedure. Other Circuits have held that failure to object to submission or withdrawal of a claim to a jury in a trial court's instructions is a waiver under Rule 51. Rogers v. Baltimore & O. R.R. Co., 325 F.2d 134, 136 (6th Cir. 1963); 5A Moore's Federal Prac., par. 51.04. Where instruc-

tions precipitate a verdict, failure to object thereto at a conference called for that purpose by the trial judge precludes attack on the verdict as an attempt to circumvent Rule 51. Mid-America Food Service v. ARA Services, Inc., 578 F.2d 691, 695 (8th Cir. 1978). A motion for a directed verdict is not a substitute for objection to instructions. Miller v. New York Cent. R.R., 239 F.2d 10, 13 (7th Cir. 1956). Here the Court of Appeals rejected, sub silento, plaintiff's Rule 51 arguments although pressed in briefs and oral argument. This conflict with other Circuits should be resolved by this Court to avoid unnecessary retrials and to allow parties and trial judges to use interrogatories and special verdicts where defendants claim that one or more of several instances of tort should not be submitted to the jury.

Another conflict with another Circuit

was also created, again without explicit discussion, when the Court of Appeals rejected plaintiff's suggestion that the Second Circuit rule of Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) be followed if it found that one of the defamation claims was improperly submitted to the jury. There, the Second Circuit ruled that if one defamation claim was supported by the evidence and another one was not, instead of ordering a retrial on the valid claim, a general verdict for damages would be appropriately reduced in amount to take into account only the proper claim. While the Third Circuit did not discuss this rule, its action in ordering a retrial constitutes a rejection thereof. The Second Circuit rule is a useful one in economizing on the time of all concerned. The jury trial here took three weeks. Even if the Second Circuit rule is not followed in all cases, it should

be permitted on motion of the successful plaintiff, especially when the defendant's attorney has not objected to submission of all claims to the jury or asked for interrogatories or special verdicts to segregate valid from invalid claims. This conflict with the Second Circuit is also important enough to warrant review here.

Finally, on plaintiff's appeal from a verdict on the interference and manipulation count, the Court of Appeals agreed with the trial judge that defendant would not be liable for his manipulation of the accreditation process unless he went further and participated in the final actions which directly damaged plaintiff, namely, the removal decisions made by Widener College officials. In other words, even though defendant forced an affiliation on the law school with intent to strip plaintiff and fellow conservatives of the protection of a

friendly Board of Trustees, and with knowledge that the new owners would be hostile to plaintiff and be likely to remove him, the defendant is not liable because he does not go further and induce the new owners to do what he knows they will do anyway.

The interference and manipulation count here is actually governed by federal common law because defendant exercised governmental power in denying plaintiff due process and equal protection in the licensing or accreditation process. Carlson v. Green, 64 L.Ed. 15 (1980). This Court has never decided what proximate cause elements are necessary for the tort of denial of constitutional rights. The rule used below is more akin to negligence concepts, and can easily leave a plaintiff remediless without justification. Many denials of constitutional rights cause damage only through the intervention of

third parties whose actions are foreseeable and intended, but not induced by the defendant official (i.e., locking a convict in a cell with others who are known to have threatened to kill him, and who do so without urging by the official). The rule adopted below could prevent recovery in many proper cases, as it did here, and is important enough to warrant review.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

ALFRED AVINS
Petitioner Pro Se
P.O. Box 2532
Washington, D.C. 20013

Sept. 8, 1980